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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether Congress may direct state and local officials to provide minimal ministerial help in implementing Federal legislation.

2. Whether, even if the challenged portions of the Brady Act violate the Constitution, they are severable from the remainder of the Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(I)
TABLE OF AUTHORITIES	III
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE CHALLENGED PROVISIONS DO NOT VIOLATE THE CONSTITUTION.	6
II. IF THE COURT CONCLUDES THAT ONE OR MORE OF THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL, IT SHOULD SEVER THOSE PROVISIONS AND LEAVE THE REMAINDER OF THE ACT IN EFFECT	18
CONCLUSION	30

TABLE OF AUTHORITIES

Cases **Pages**

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) 5, 18-21

Bell v. *Burson*, 402 U.S. 535 (1971) 29

Blair v. *City of Chicago*, 201 U.S. 400 (1906) 21

Board of Curators v. *Horowitz*, 435 U.S. 78 (1978) 29

Coyle v. *Oklahoma*, 221 U.S. 559 (1911) 7

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Trades Council*, 485 U.S. 568 (1988) 23

Electric Bond Co. v. *SEC*, 303 U.S. 419 (1938) 21

FERC v. *Mississippi*, 456 U.S. 742 (1982) 9-11

Frank v. *United States*, 78 F.3d 815 (2d Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (Jun. 13, 1996) 17

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 6, 9, 10, 16

Hodel v. *Virginia Surface Mining & Recl. Ass'n, Inc.*, 452 U.S. 264 (1981) 9, 12

INS v. *Chadha*, 462 U.S. 919 (1983) 21

Kentucky v. *Dennison*, 65 U.S. (24 How.) 66 (1861) 10

TABLE OF AUTHORITIES — Continued

Pages

Koog v. *United States*, 79 F.3d 452 (5th Cir. 1996) 18

Leavitt v. *Jane L.*, 116 S. Ct. 2068 (1996) 22

Mondou v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1912) 11

Morrison v. *Olson*, 487 U.S. 654 (1988) 8

New York v. *United States*, 326 U.S. 572 (1946) 16

New York v. *United States*, 505 U.S. 144 (1992) 7, 9, 11-15, 18

Puerto Rico v. *Branstad*, 483 U.S. 219 (1987) 7, 10

South Carolina v. *Baker*, 485 U.S. 505 (1988) 10, 11

South Dakota v. *Dole*, 483 U.S. 203 (1987) 9

Testa v. *Katt*, 330 U.S. 386 (1947) 11

United States v. *La Franca*, 282 U.S. 568 (1931) 21

United States v. *New Mexico*, 455 U.S. 720 (1982) 12

Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 10-11

TABLE OF AUTHORITIES — Continued

Pages

Statutes

15 U.S.C. § 2224 8

15 U.S.C. § 2645 8

18 U.S.C. § 922 20

18 U.S.C. § 922(s) 18-20, 22, 27, 28, 29

18 U.S.C. § 922(s)(1) 3, 4

18 U.S.C. § 922(s)(1)(C)-(D) 3

18 U.S.C. § 922(s)(2) 4, 16

18 U.S.C. § 922(s)(6)(B) 4

18 U.S.C. § 922(s)(6)(B)(ii) & (iii) 27

18 U.S.C. § 922(s)(6)(C) 4

18 U.S.C. § 922(s)(7) 5

18 U.S.C. § 922(s)(8) 4

18 U.S.C. § 922(t) 3

18 U.S.C. § 922(t)(1) 3

18 U.S.C. § 922(t)(3)(A) 3

18 U.S.C. § 925A 28

18 U.S.C. § 928 . . . . . 19, 21

18 U.S.C. § 1001 4

23 U.S.C. § 402(a) 6, 8

TABLE OF AUTHORITIES — Continued

Pages

42 U.S.C. § 2021c(a)(1)(A) 12

42 U.S.C. § 2021e(d)(2)(C) 12

42 U.S.C. § 5779(a) 6, 7

42 U.S.C. § 6991c 8

42 U.S.C. § 11001 8

92 Stat. 1744 20

92 Stat. 1750 20

Pub. L. No. 90-351, Section 902, 82 Stat. 197 19

Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) 1

107 Stat. 1536, § 102(a)(1) 20

107 Stat. 1542, § 103(i) 28

Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (1798) 7

Act of Mar. 26, 1790, ch. 3 § 1, 1 Stat. 103 (1790) 7

Miscellaneous

59 Fed. Reg. 37532 3

137 Cong. Rec. H11756 (daily ed. Nov. 26, 1991) 23, 26

137 Cong. Rec. S8939 (daily ed. June 27, 1991) 26

TABLE OF AUTHORITIES — Continued

Pages

139 Cong. Rec. H756 (daily ed. Feb. 23, 1993) 26

139 Cong. Rec. H9089 (daily ed. Nov. 10, 1993) 26

139 Cong. Rec. H9099 (daily ed. Nov. 10, 1993) 26

139 Cong. Rec. H9106 (daily ed. Nov. 10, 1993) 26

139 Cong. Rec. H9110 (daily ed. Nov. 10, 1993) 26

139 Cong. Rec. H9113 (daily ed. Nov. 10, 1993) 27

139 Cong. Rec. H9114 (daily ed. Nov. 10, 1993) 27

139 Cong. Rec. H 9118 (daily ed. Nov. 10, 1993) . . . 26

139 Cong. Rec. H10907 (daily ed. Nov. 23, 1993) . . . 24

139 Cong. Rec. S. 16413
(daily ed. Nov. 19, 1993) 26

139 Cong. Rec. S16414 (daily ed. Nov. 19, 1993) . . . 26

H.R. Rep. No. 344, 103d Cong.,
1st Sess. 8 (1993), reprinted
in 1993 U.S.C.C.A.N. 1984 . . . . . 2, 24, 29

Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 1st Sess.
(1993) 24, 27

Handgun Violence Prevention Act of 1987, Hearings on S. 466 Before the Subcomm. on the Constitution of the Comm. on the Judiciary,
100th Cong., 1st Sess. (1987) 25

TABLE OF AUTHORITIES — Continued

Pages

The Federalist, (J. Cooke ed.) 7

The Federalist, (B. Wright ed. 1961) 16

Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 100th Cong., 1st and 2d Sess. (1987 - 1988) 24

BRIEF OF *AMICI CURIAE* SENATORS HERB KOHL, PAUL SIMON, JOHN CHAFEE, EDWARD M. KENNEDY, DIANNE FEINSTEIN, JOHN KERRY, FRANK LAUTENBERG, TOM HARKIN, BILL BRADLEY, CAROL MOSELEY-BRAUN, AND BOB KERREY IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici are a bipartisan group of 11 United States Senators who sponsored and worked for the passage of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536 (1993) ("the Brady Act"). Through the Brady Act, *amici* forged a simple — and very effective — tool to combat the epidemic of handgun violence plaguing our nation: federally mandated background checks aimed at keeping guns out of the hands of violent criminals, drug abusers and others prohibited by law from possessing firearms. As a direct result of these background checks, more than 100,000 felons and other prohibited persons have been prevented from purchasing handguns over the past three years alone. *Amici* have a strong interest in ensuring that this extraordinarily successful — and lifesaving — legislation be allowed to continue in force.

Amici also have a second, broader interest in this case. From its earliest sessions, Congress has understood its powers under the Constitution to include the flexibility to enlist the ministerial aid of local officials in executing federal legislation. It accordingly has enacted numerous measures that direct local officials to provide minor assistance in implementing federal law. Adopting the position advanced by petitioners in this case would throw the constitutionality of those laws into doubt and would deny Congress the use of an important and longstanding strategy when crafting future legislation. *Amici* thus submit this brief to urge the Court to construe the federalism principles embodied in the Constitution in a manner that does not unduly restrict

Congress' ability to enact all laws that are necessary and proper to carrying out its constitutional duties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the Brady Act in response to "an epidemic of gun violence." H.R. Rep. No. 344, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985.[1] As the House Report accompanying the legislation explained, handgun violence claimed the lives of more than 12,000 Americans in 1992, the year preceding the Brady Act's enactment. *Ibid.* During that same year, firearm-wielding criminals robbed or assaulted 530,000 Americans, and 15,000 American women were attacked by armed rapists. *Ibid.* This recurring violence took its toll not only on human lives, but also on the national economy; one study reviewed by Congress estimated that firearm injuries exacted $1.4 billion in medical costs and $19 billion in lost productivity each year. *Ibid.*

Although prior to the Brady Act, federal law prohibited convicted felons and other categories of persons from obtaining firearms, the ease with which those persons could obtain such weapons made it clear that more needed to be done.[2] Congress accordingly crafted the Brady Act to ensure that persons prohibited by law from obtaining handguns could no longer simply walk into a gun store and buy a handgun at will. Instead, from the Act's passage forward, it would be unlawful for federally licensed gun dealers to sell, deliver or

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[1] The Senate did not submit a report with the legislation.

[2] One survey of prison inmates, for example, found that 27 percent of armed felons purchased their guns at retail stores, and the experience of those States that already required background checks confirmed that an extremely large number of prohibited persons sought to obtain firearms through licensed dealers. See H.R. Rep. No. 344, *supra*, at 9-10.

transfer handguns to persons prohibited by federal law from obtaining such guns. 18 U.S.C. §§ 922(s)(1), (t)(1).[3]

The Act directs gun dealers to comply with this mandate in one of two ways. After the establishment of a national instant criminal background check system (to occur no later than early 1999), gun dealers will, with limited exceptions, have to contact that system prior to selling a handgun to a prospective purchaser. If the system informs the gun dealer that the prospective purchaser falls into one of the prohibited categories, the dealer may not consummate the sale. See 18 U.S.C. § 922(t).

Until the national system is up and running, however, the Act provides for an interim approach, which enlists the aid of local law enforcement officials in providing the information the gun dealer needs to determine whether he may consummate the sale. Under the interim system the dealer must, with limited exceptions, (1) obtain a statement from the prospective purchaser containing that person's name, address, and date of birth, as well as that person's statement that he or she does not fall into one of the categories of persons prohibited from purchasing a gun;[4] (2) verify the identification of the prospective purchaser; and (3) provide notice of the prospective purchaser's statement to the Chief Law Enforcement Officer ("CLEO") in the purchaser's place of residence. The dealer then may consummate the sale only

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[3] The Act's mandates do not apply in those States that have permit or background check requirements. 18 U.S.C. §§ 922(s)(1)(C)-(D), (t)(3)(A). 59 Fed. Reg. 37532-37534 provides a list of those States subject to the federal waiting period.

[4] Gun dealers use a form referring to the Bureau of Alcohol, Tobacco and Firearms and the "federal 5-day waiting period" to obtain this information. See Attachment 2 to Revised Brief of *Amici Curiae* Opposing Plaintiff's Motion for Preliminary Injunction, *Mack* v. *United States*.

after five business unless he receives notice from the CLEO that the sale would be unlawful. 18 U.S.C. § 922(s)(1).

Although the Act puts the primary onus of implementing its mandates upon gun dealers, it also imposes three requirements upon CLEOs: (1) to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [by the prospective purchaser of the handgun] would be in violation of the law * * *" (18 U.S.C. § 922(s)(2)); (2) to destroy any records relating to the background check within 20 business days if the background check does not indicate that the gun purchase would be unlawful (18 U.S.C. § 922(s)(6)(B)); and (3) if a person who was found to be ineligible so requests, to provide him with the reasons for his ineligibility in writing within 20 days (18 U.S.C. § 922(s)(6)(C)). Of course, these duties need not actually be performed by the CLEO: the statute allows the CLEO to designate another individual as the person responsible for background checks. 18 U.S.C. § 922(s)(8) (defining CLEO as "the chief of police * * * or an equivalent officer or the designee of any such individual").

CLEOs thus play a very limited role in the Brady Act's implementation — one that focuses exclusively on the procuring and providing of information and not at all on the enforcement of the Act. If, for example, the CLEO's background check reveals that the prospective purchaser is a convicted felon or otherwise prohibited from purchasing a handgun, the CLEO need not arrest the prospective purchaser for providing false information to the government.[5] Nor does the CLEO have any obligation to follow up with the gun dealer to determine whether he properly denied the prospective purchaser's request to obtain a handgun. And, of

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[5] It presumably would be up to federal law enforcement officers to charge any prospective purchaser who knowingly and willfully included false material information on his form with a violation of 18 U.S.C. § 1001.

course, if the gun dealer does, in fact, violate the Brady Act by selling the gun despite the information provided by the CLEO — or if a gun dealer within his jurisdiction refuses even to obtain the required information from his customers — nothing in the Brady Act requires, or, indeed, even authorizes, the CLEO to charge either the gun dealer or the purchaser with a violation of the law's mandates. Finally, the Act specifies that CLEOs may not face damages actions either for preventing a lawful sale or for failing to prevent the consummation of an unlawful one. 18 U.S.C. § 922(s)(7). And CLEOs are not subject to any criminal sanctions.

Thus understood, the three challenged provisions of the Brady Act (the requirements to make a reasonable effort at conducting a background check, to destroy records of those prospective purchasers who are permitted to buy handguns, and to provide reasons why a prospective purchaser may not purchase a handgun if requested) do not transgress against any Constitutional restriction on Congress' power.

This Court has never invalidated an Act of Congress on the ground that it required state or local officials to perform specified ministerial acts. History, precedent, and logic demonstrate that -- in contrast to a federal directive to enact a state law, which does violate the Tenth Amendment -- there is no flat constitutional prohibition against enlisting state employees to perform ministerial tasks. Because the Brady Act does not impose undue burdens on state or local officials, it should be upheld by this Court.

Even if part of the Brady Act is unconstitutional, it should be severed from the rest of the statute. Petitioners have failed to produce the required "strong evidence" that Congress would not have enacted the remainder of the statute. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

ARGUMENT

I. THE CHALLENGED PROVISIONS DO NOT VIOLATE THE CONSTITUTION.

Petitioners' submission to this Court is simple in appearance, yet radical in effect. Petitioners ask the Court to hold that the federal government may never direct a state or local official to perform *any* act, no matter how ministerial and trivial it might be. It is worth pausing to consider the dramatic implications of such a submission. Under petitioners' regime the federal government could not, for example, require state officials to do something as simple as report missing children or traffic fatality statistics to a central registry (see, *e.g.*, 42 U.S.C. § 5779(a); 23 U.S.C. § 402(a)); nor could the federal government direct state personnel to participate in actions as significant as emergency disaster relief. Not surprisingly, petitioners are unable to muster any support for their supposed black-letter rule.

To begin with, nothing in the text of the Constitution suggests the broad principle that Congress may not seek the aid of local officials in implementing federal law. To the contrary, the Constitution grants Congress broad authority "to regulate commerce * * * among several States" (Art. I, sec. 8, cl. 3) and "to make all laws necessary and proper for carrying into execution" that authority (Art. I, sec. 8, cl. 18), and it nowhere suggests that the term "*all* laws necessary and proper" (emphasis added) does not encompass those laws that enlist the aid of local officials. For this reason, the Tenth Amendment's reservation to the States of the "powers not delegated to the United States by the Constitution" cannot apply as a textual matter to the Brady Act, because Congress has, in fact, been delegated the power to make the law now being challenged. Accord *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548-551 (1985).

Moreover, this Court has never invalidated an Act of Congress on the ground that it required state or local officials to perform specified ministerial acts. Although the Court has recognized — in *New York* v. *United States*, 505 U.S. 144 (1992), and *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911) — limits on the authority of the federal government vis-a-vis the States, it has never endorsed the broad principle proffered by petitioners here. Rather, it has *upheld* federal statutes that impose ministerial obligations on state officials. See, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 229-230 (1987) (holding that the Extradition Act required the Governor of Iowa to extradite a fugitive to Puerto Rico).

Finally, as the Solicitor General and the other *amici* explain, both the Framers of the Constitution and the early Congresses clearly believed that the "necessary and proper" clause authorizes Congress to use state officials in carrying out federal legislation. See, *e.g.* The Federalist, No. 36 at 227 (Hamilton) (J. Cooke ed.) (Congress may use State officers and regulations to collect federal taxes); *id.*, No. 45 at 313 (Madison) ("[i]ndeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union"); *id.*, No. 27, at 174 (Hamilton) (the Constitution "will enable the government to employ the ordinary magistracy of each [state] in the execution of the laws"); Act of Mar. 26, 1790, ch. 3 § 1, 1 Stat. 103 (1790) (direction to state court clerks to record application of person seeking citizenship under federal law); Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (1798) (directing state court clerks, among others, to transmit declarations of intent to become citizens to Secretary of State).

More recent Congresses have continued to legislate in this vein, requiring state officials to assume a wide range of ministerial duties in the name of advancing Federal law. As we note above, for example, 42 U.S.C. § 5779(a), requires

State and local law enforcement agencies to report cases of missing children, and 23 U.S.C. § 402(a) mandates States to implement highway safety programs and to report traffic fatalities. Similarly, 15 U.S.C. § 2645 directs governors to take certain actions with respect to local educational agencies, while 42 U.S.C. § 11001 requires States to take certain actions with respect to the release of hazardous substances. See also, *e.g.*, 15 U.S.C. § 2224 (States must submit to federal government list of places of public accommodation); 42 U.S.C. § 6991c (requiring States to create inventory of underground storage tanks and submit it to federal agency).

Of course, these factors do not by themselves establish the validity of the statutory provisions challenged here. But they do demonstrate that acceptance of petitioners' extremely broad submission would represent a dramatic change in this Court's jurisprudence. In applying separation of powers principles, the Court has recognized that the Framers eschewed formalistic bright-line standards in favor of a more flexible analysis. See, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 693-694 (1988). The Court should follow the same approach here. Under that analysis, the Brady Act is plainly constitutional.

1. Resolving this case requires the Court to identify the nature and purpose of the controlling constitutional principle. Petitioners' formalistic rule necessarily rests on the assertion that the Constitution precludes any federal interference, no matter how trivial, with the formulation and implementation of state policy. That assertion, however, cannot be reconciled with the settled law that fleshes out the *limits* on the Tenth Amendment principle.

First, it is beyond dispute that Congress may displace state and local policy choices through its power of preemption; "it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning nongovernmental activity, no matter what the strength of the competing local interests."

FERC v. *Mississippi*, 456 U.S. 742, 766 (1982). Through the exercise of this power Congress may act directly on state and local officials by requiring them to refrain from particular actions. And while a preemptive federal statute does not require state or local officials to perform affirmative acts, "a federal veto of the States' chosen method" of action is no "less intrusive in any realistic sense" than are mandates to act in a particular manner. *Id.* at 763 n.27.

Second, it has long been settled that Congress may seek to induce particular action on the part of States. Congress may, of course, "'attach conditions to the receipt of federal funds.'" *New York*, 505 U.S. at 167, quoting *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). And "where Congress has the authority to regulate private activity under the Commerce Clause, [the Court has] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. That is so even when the choice of abandoning local regulation is unrealistic in the extreme, so that the federal rule will, as a practical matter, "'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of 'integral governmental functions.'" *FERC*, 456 U.S. at 766, quoting *Hodel* v. *Virginia Surface Mining & Recl. Ass'n, Inc.*, 452 U.S. 264, 289 (1981).

Third, the Court repeatedly has made clear that federal legislation does not transgress the Constitution's federalism principles simply because it imposes financial burdens upon the States: "'the determinative factor * * * is the nature of federal action, not the ultimate economic impact on the States.'" *FERC*, 456 U.S. at 770 n.33, quoting *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. at 292 n. 33.[6] See *Garcia*, 469 U.S. at 555-556 ("Congress' action

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[6] *FERC* cannot be distinguished on the ground that States could

in affording [local government] employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause"); *South Carolina* v. *Baker*, 485 U.S. at 515 (observing that *Garcia* required some States and municipalities to raise funds necessary to comply with the overtime provisions of the FLSA). Petitioners therefore are wrong in contending that the mere fact that federal law dictates how they must use their resources gives them grounds to seek judicial redress.

Fourth, the Court has long recognized that Congress may impose certain direct, affirmative obligations on state officials. The Court thus has expressly rejected "the 19th-century view, expressed in a well-known slavery case, * * * that Congress 'has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it.'" *FERC*, 456 U.S. at 761, quoting *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107 (1861). See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 230 (1987) (overruling *Dennison*). Instead, "[w]hile th[e] Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, * * * there are instances where the Court has upheld federal structures that in effect directed state decisionmakers to take or refrain from taking certain actions," or that "impose[d] an affirmative obligation upon state officials." *FERC*, 456 U.S. at 763 n.27. See *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988); *Washington* v.

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choose whether or not to comply with the federal mandate there at issue. In fact, the statute challenged in *FERC* imposed significant costs upon the States regardless of what they chose to do; after all, the alternative to incurring the costs imposed by the statute — shutting down the State's entire utility regulation system — undoubtedly would be far from cost free. See *FERC*, 456 U.S. at 766 (recognizing difficulty in abandoning regulation of utilities where Congress failed to provide alternative to state regulation).

Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

Similarly, in *Testa* v. *Katt*, 330 U.S. 386 (1947), the Court held that Congress may require state courts to adjudicate causes of action created by federal law. Federal law thus may compel state court judges to hear and decide lawsuits that otherwise would not be entertained by these courts. See also *Mondou* v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1912). The Court subsequently explained that, under the analysis of *Testa*, "the Federal Government has some power to enlist a branch of state government * * * to further federal ends." *FERC*, 456 U.S. at 762. And whatever may be said to distinguish these decisions on their facts from circumstances involving "congressional requirements that States regulate" (*New York*, 505 U.S. at 178), the Court's holding surely cannot be reconciled with petitioner's submission that Tenth Amendment principles wholly preclude the imposition of federal burdens on state and local officials.

2. Against this background, the controlling rule is clear: federalism principles come into play in this context only when Congress would "'directly compel[]' the States to enact a legislative program." *FERC*, 456 U.S. at 765. This rule follows from the Court's recognition that "having the power to make decisions and to set policy is what gives the State its sovereign nature." *Id.* at 761. This rule follows from the constitutional history indicating that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *New York*, 505 U.S. at 166 (emphasis added). See *id.* at 161-162. And this rule follows from what the Court has identified as the principal utilitarian value of Tenth Amendment limits on federal power: that "[a]ccountability is diminished" when "federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their

decision." *Id.* at 169. Moreover, given the undisputed congressional authority to impose very significant limits and obligations on state officials, a rule that prohibits the federal government only from *compelling state legislation* follows from what the Court, in the closely related setting of intergovernmental tax immunity, has described as the "essentially symbolic importance" of the constitutional limit. *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982).

This rule — that Congress may not "'directly compel[] [States] to enact and enforce a federal regulatory program'" (*New York*, 505 U.S. at 176, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288) — was the basis for the Court's decision in *New York*, the decision upon which petitioners hinge their entire argument. The Low-Level Radioactive Waste Policy Amendments Act of 1985 at issue in *New York* directed that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of * * * low-level radioactive waste generated within the State." 42 U.S.C. § 2021c(a)(1)(A). If a State did not comply with that mandate within the specified time frame, one section of the Act, known as the "take title" provision, directed that the State, "upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste * * *." 42 U.S.C. § 2021e(d)(2)(C). As the Court explained it, the Act presented States with two options, both of which compelled the State to adopt the federal policy as its own: either to enact the specified legislation or to take an action — assuming physical and financial responsibility for all low-level radioactive waste in its borders — that was tantamount to the adoption of the federally mandated policy.

In striking down the law, the Court focused exclusively on the prospect that States would be forced to enact

regulatory programs. The Court thus stated the issue in the case as "whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." 505 U.S. at 161. The principle the Court found to be controlling was the rule that Congress "lacks the power directly to compel the States to require or prohibit [specified] acts." *Id.* at 166. See *id.* at 161-163 (citation omitted) (Congress may not require States "'to enact and enforce a federal regulatory program'"); *id.* at 178 (emphasis in original) (Congress cannot "command a state government to enact *state* regulation"); *ibid.* (distinguishing cases that do not involve "congressional requirements that States regulate"); *id.* at 179 (Court's prior decisions "by no means imply any authority on the part of Congress to mandate state regulation"); *id.* at 180 (emphasis in original) ("the Framers did *not* intend that Congress should exercise [the commerce] power through the mechanism of mandating state regulation"). The consistency of this formulation in *New York* plainly suggests that the Court's holding was confined to circumstances where Congress directs the States to exercise their regulatory authority.

That conclusion is confirmed by the *New York* Court's analysis of the two-sided take title provision. The first option presented to the States — that of "regulating pursuant to Congress' direction" (505 U.S. at 174) — "would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.* at 176.

The second option available to States — that of taking title to the radioactive waste and becoming liable for all of the waste generators' damages and liabilities — was similarly flawed. The forced transfer of title and liablity "would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers" (505 U.S. at 175), and therefore would effectively

treat the States as if they *had* enacted the federal program.[7] "Either way," the Court therefore concluded, "'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (citation omitted).

3. Application of the controlling principle here makes clear that the Brady Act is a proper exercise of congressional authority. The Act does not require the States to enact *any* legislation, but rather directs state and local government employees to perform ministerial acts specified by federal law. It does not obligate state officials to exercise uniquely sovereign prescriptive authority; instead, it directs the CLEO to make the requisite background check only because he or she has best access to the relevant information.

The Act, moreover, plainly establishes a *federal* policy, and it imposes no obligation upon local officials to adopt that policy as their own. If a gun dealer refuses to obtain the mandated information from his customers, for example, the Brady Act does not require CLEOs to take any action against that dealer. If a gun dealer decides to sell a handgun to a purchaser whom the CLEO has told him is prohibited from obtaining a handgun, the CLEO need take no action. And, if a potential purchaser provides false information to the gun dealer (and therefore to the CLEO), the Brady Act provides no basis for the CLEO to take any action against that potential purchaser. Instead, the Brady Act leaves it to *federal* officers to enforce each and every one of its mandates, requiring CLEOs to do only one simple thing:

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[7] In addition, the take title requirement itself acted against the States in a uniquely intrusive manner. It required States to take title to property in their sovereign capacity, while subjecting States to actions for money damages. This requirement, which implicated the state sovereign immunity recognized by the Eleventh Amendment, was inconsistent with central notions of sovereignty.

provide information to gun dealers so that those dealers may comply with the federal law.

Thus, the Brady Act not only is functionally different from the statute found offensive in *New York*; it also does not raise any of the accountability concerns cited by the Court. The federal government enacted the law "in full view of the public" (*New York*, 505 U.S. at 168), and every interaction the citizenry has with the law's enforcement provides a reminder that it was federal, not state, officials, who are charged with enforcing its dictates. Again, when prospective purchasers attempt to purchase a handgun, they are immediately informed that *federal* law requires a background check and a five-day waiting period.[8] If any person violates the law's mandates, they will have only *federal*, not state officials to face. And, although CLEOs do have a statutory obligation to inform persons denied guns of the reasons for the denial upon their request, there is nothing preventing those CLEOs from including in their letter the truthful statement that it is due to *federal* law that they are being denied a gun.

4. While it therefore is plain that the Brady Act does not run afoul of the federalism principles that underlay *New York*, we do not suggest that the federal government is free to impose limitless burdens on the personnel of state and local governments. In the past, the Court has suggested that, in practice, the Tenth Amendment may take account of "the degree to which [federal] laws would prevent the State from functioning as a sovereign." *New York*, 505 U.S. at 177. It thus may be that federal laws that are exceptionally intrusive in the demands that they place upon state employees may run up against "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the

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[8] See Department of Treasury, Bureau of Alcohol, Tobacco and Firearms Form, used by gun dealers to obtain required information from purchasers, note 4, *supra*.

essentials of state sovereignty.'" *Garcia*, 469 U.S. at 547 (citation omitted) (bracketed material added by the Court).

But there is no need for the Court, in this case, to consider the outer limits of any such restriction on federal authority. The limited and ministerial burdens imposed by the Brady Act do not remotely threaten the efficacy of state government. And the danger that any federal law will do so is remote; as Madison explained, the federal government "'will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'" *Garcia*, 469 U.S. at 551, quoting The Federalist, No. 46, at 332 (B. Wright ed. 1961) (bracketed material added by the Court). In these circumstances,

> [t]he process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need [the Court] go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.

New York v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.). Because the Brady Act does not compel the States to exercise their legislative powers and does not impose undue burdens on state or local officials, it should be upheld.

5. A brief review of the three provisions of the Brady Act challenged by petitioners confirms this conclusion. The burdens imposed on state or local officials are minimal.

Petitioners focus most of their attention on the requirement that the CLEO (or his or her designee) "make a reasonable effort to ascertain within 5 business days whether receipt or possession [by the prospective purchaser of the handgun] would be in violation of the law * * *" (18 U.S.C. § 922(s)(2)). Significantly, the CLEO need only make a

"reasonable effort": the requirement is thus flexible, not fixed. As the Second Circuit explained:

> Because the relevant circumstances — including the availability of resources, access to records, frequency of requests, and the likelihood that the CLEO will be personally acquainted with the transferee — will vary among different localities, what is a "reasonable effort" depends upon the jurisdiction. * * * The Brady Act's use of a highly subjective standard ensures that state officials are not excessively burdened.

Frank v. *United States*, 78 F.3d 815, 830 (2d Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (Jun. 13, 1996) (No. 95-2006).

Petitioners also claim that the requirement that they destroy all statements from gun dealers after twenty days is independently unconstitutional. This claim borders on the frivolous. Can the Constitution possibly bar Congress from requiring the destruction of forms prepared pursuant to federal law? The burden is trivial — an employee simply must throw the forms into the garbage. And the federal government has a strong interest in controlling information created pursuant to federal law.

Finally, petitioners argue that federal law cannot require CLEOs to provide, if requested, the reasons why an individual was found to be ineligible to receive a gun. If the reasonable effort provision is constitutional, it is difficult to see why the requirement of an explanation would violate the Constitution. The additional burden is minimal. And due process may well impose this requirement in any event (see page 29, *infra*).

If the reasonable effort provision is unconstitutional, the explanation requirement would arise only if the CLEO voluntarily decided to conduct the background check. In that case, the requirement would flow not from federal law, but

rather from the CLEO's voluntary decision to perform the check. Like a grant condition that applies because of a State's voluntary decision to accept the federal funds, a condition on a CLEO's voluntary decision to perform a background check would not implicate the Tenth Amendment.

In sum, the limited — and entirely ministerial — duties imposed by the Brady Act do not violate the Constitution.

II. IF THE COURT CONCLUDES THAT ONE OR MORE OF THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL, IT SHOULD SEVER THOSE PROVISIONS AND LEAVE THE REMAINDER OF THE ACT IN EFFECT.

If the Court concludes, contrary to our submission, that one or more of the challenged provisions of Section 922(s) are unconstitutional, the Court should sever those provisions and leave the remainder of the law in effect. Petitioners' contention that the entire subsection must be invalidated finds no support in this Court's jurisprudence. Indeed, petitioners' contentions have been rejected by the only court of appeals that has addressed this issue. See *Koog* v. *United States*, 79 F.3d 452, 463 (5th Cir. 1996).

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *New York* v. *United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted)).

There can be no doubt that the latter test is satisfied here — the unchallenged portions of Section 922(s) are fully operative as a law. The invalidity of the "reasonable effort" provision simply would render the background check optional. The statute requires gun manufacturers, importers,

and dealers to submit information to the CLEO. The CLEO then could decide to conduct the background check within the five-day period or to do nothing.

Even if the Court concludes that the other two provisions challenged by petitioners are invalid, the statute is fully functional. CLEOs simply would not be required by federal law to discard Brady Act records within twenty days. And CLEOs who voluntarily conducted background checks would not be required by statute to provide on demand the reasons the CLEO determined that a person was ineligible to receive a gun.

The second part of the inquiry — whether it is "evident that the Legislature would not have enacted" the remaining provisions — varies depending upon whether "Congress has explicitly provided for severance by including a severability clause in this statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 686. Accordingly, the next step in the analysis is to ascertain whether a severability clause applies to Section 922(s).

Section 922(s) is part of chapter 44 of title 18 of the United States Code.[9] That chapter contains a severability clause, 18 U.S.C. § 928, which states that "[i]f any provision of this chapter * * * is held invalid, the remainder of the chapter * * * shall not be affected thereby."

Petitioners argue (Printz Br. 47-48) that the Section 928 severability clause does not apply to Section 922(s), relying on a footnote in *Alaska Airlines*. The situation here is completely different from the one before the Court in *Alaska Airlines*.

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[9] Chapter 44 was added to title 18 by the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Section 902, 82 Stat. 197, 226.

The statutory provision at issue in *Alaska Airlines* was Section 43 of the Airline Deregulation Act of 1978. Some provisions of the Deregulation Act were explicitly framed as amendments to the Federal Aviation Act of 1958. See, *e.g.*, 92 Stat. 1744 (Section 40 of the Deregulation Act "amended the Federal Aviation Act "by adding at the end thereof the following new title"). Section 43, by contrast, was not cast as an amendment to the Federal Aviation Act (see 92 Stat. 1750), but rather was subsequently codified with the provisions of the Aviation Act.

This Court concluded that "[t]he applicability of [the Federal Aviation Act's severability] clause to § 43 is in doubt, * * * because, unlike many other sections of the Deregulation Act, [Section 43] does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program." 480 U.S. at 686-687 n.8.

Here, of course, Section 922(s) *was* explicitly framed by Congress as an amendment of existing law. See Section 102(a)(1), 107 Stat. 1536 ("Section 922 of title 18, United States Code, is amended by adding at the end the following"). For that reason, the severability clause expressly applies to Section 922(s) and the doubt expressed in the *Alaska Airlines* footnote is wholly inapplicable in this case.[10]

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[10] Petitioners may try to argue that Section 922(s) adds a "new program" to chapter 44 of title 18, and that the severability clause should not apply for that reason. To begin with, it is clear that this Court used the phrase "new program" in *Alaska Airlines* to identify a statutory provision that was not framed as an amendment to existing law. See 480 U.S. at 686-687 n.8 (distinguishing between a provision amending a "pre-existing statute" and a "new program"). As we discuss in text, Section 922(s) plainly is not a "new program" within the meaning of *Alaska Airlines*.

Moreover, it would be nonsensical to hold that severability clauses in pre-existing statutes do not apply to provisions expressly

"This Court has held that the inclusion of [a severability] clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 686 (citations omitted). Accordingly, petitioners must provide "strong evidence" of congressional intent in order to prevent severance here.[11]

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framed as amendments to such statutes if the amendments constitute a "new program." Once an amendment is enacted it legally equivalent to the original statutory language and should be treated in the same manner as the original text. See, *e.g.*, *United States* v. *La Franca*, 282 U.S. 568, 576 (1931) (observing that statutes had been amended and stating that "as thus amended, these statutes now are to be read, as to all subsequent occurrences, as if they had originally been in the amended form"); *Blair* v. *City of Chicago*, 201 U.S. 400, 475 (1906) ("'[a] statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there'") (citation omitted). That standard would also be extremely difficult to apply: precisely when does a change in an existing statute amount to a "new program"? Clear rules of interpretation enable Congress to be certain about the legal effect of legislative action. The requisite clarity is provided by the general principle that an amendment to a statute will be governed by any severability provision applicable to that statute.

[11] Petitioners also contend (Printz Br. 48-49) that the severability clause contained in Section 928 only protects against invalidation of all of chapter 44 of title 18, but does not direct the severance of an invalid portion of one subsection from the remainder of that subsection. That argument is simply wrong. This Court repeatedly has relied upon clauses with language essentially identical to Section 928 in saving the valid portions of a subsection containing one or more unconstitutional provisions. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 932 (1983); *Electric Bond Co.* v. *SEC*, 303 U.S.

Petitioners cannot carry that burden. At the outset, it is important to emphasize the difficulty inherent in petitioners' task. This Court has recognized how hard it is to determine congressional intent with respect to legislation that *is* enacted based upon committee reports, floor statements, and other legislative history. It is much more difficult to use these sources to determine what Congress *might* have done with respect to hypothetical legislation if it had been aware of the constitutional limits on its authority. For that reason, the Court should insist on extremely clear evidence establishing a widespread congressional consensus before concluding that a party has met its burden of proving that constitutional provisions are not severable from unconstitutional ones.

Petitioners advance three separate arguments to show that Section 922(s) should be invalidated in its entirety. First, they contend that Congress would not have enacted a law with an optional background check. Second, they contend that Congress would not have enacted a law allowing local officials to retain gun sales records. Third, they contend Congress would not have enacted a statute without granting a person barred from purchasing a gun the right to obtain the reasons the CLEO determined that the person was ineligible to receive the gun. We address each argument in turn.

1. The statute that ultimately was enacted demonstrates that Congress preferred a mandatory background check coupled with a five-day waiting period over an optional background check. The question here, however, is whether petitioners have provided "strong evidence" that Congress would have preferred no background check at all to an optional background check. *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2072 (1996) ("[t]he relevant question is whether the legislature would prefer not to have B [the constitutional

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419, 434 (1938).

portions of the law] if it could not have A [the unconstitutional portions] as well").

Much of petitioners' evidence is wholly irrelevant. For example, the fact that Congress rejected efforts to make the mandatory check into an optional check (Mack Br. 42; Printz Br. 35-37) shows only that Congress preferred a mandatory check, not that it would have chosen to eliminate background checks entirely if a mandatory check were not a permissible option.

Petitioners point to statements by several Members of an earlier Congress criticizing optional background checks because of the possibility of discrimination by local officials. See Mack Br. 43; Printz Br. 35 n.43. But only one of those Congressmen subsequently voted for a bill providing for mandatory background checks. See 137 Cong. Rec. H11756-H11757 (daily ed. Nov. 26, 1991). Because these Congressmen opposed *all* background checks, their statements are wholly irrelevant to the issue here. Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 584-585 (1988) (views of opponents not persuasive in interpreting legislation).

Thus, the only clear expression of support for no background check at all over an optional check is the statement by Representative Zimmer cited by petitioners. See Mack Br. 41-42; Printz Br. 37.[12] The statement of a single

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[12] The statement by Senator Mitchell cited by petitioner Printz (Br. 35 n.43) relates to a 14-day waiting period and therefore provides no evidence concerning Congress's likely view of a bill with a considerably shorter (five-day) waiting period. Senator Metzenbaum's statement (Printz Br. 38) merely explains the effect of the statutory provision and provides no evidence of his views concerning optional background checks. Senator Jeffords' statement (Printz Br. 37-38) reveals only that he would not support a waiting period without some background check provision; it does not indicate that he would have opposed the bill if the background

Congressman plainly does not provide the required "strong evidence" regarding the intent of the entire Congress.

There is, moreover, considerable evidence indicating that Congress would have preferred an optional background check to no background check at all. In 1991, the House of Representatives passed just such a measure by a 239-186 vote (H.R. Rep. No. 344, *supra*, at 14), a margin similar to the 238-187 majority that enacted the final provision (139 Cong. Rec. H10907-H10908 (daily ed. Nov. 23, 1993)). These votes show that the two approaches had roughly similar levels of support.

As we have discussed (see pages 1-2, *supra*), the principal goal of the Act's proponents was to combat the explosion of handgun violence by keeping guns out of the hands of those persons prohibited by law from possessing them. Simple logic compels the conclusion that if Congress were forced to choose between optional background checks and no checks at all, it would pick the former option. Congress was keenly aware that local law enforcement officers vigorously supported background checks.[13]

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check had been optional.

[13] A representative of the International Association of Police Chiefs testified that "compelled or not, we in law enforcement management want to conduct the background checks." *Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 207 (1993) (testimony of David B. Mitchell, Chief of Police, Prince Georges county Police Department, Palmer Park, Md., on behalf of the International Association of Chiefs of Police); see also *Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. 33 (1987 - 1988) (testimony of Lawrence E. Whalen, Chief of Police, Cincinnati Police Division, on behalf of the International Association of Chiefs

Congress would logically assume that a considerable number of CLEOs would participate in a voluntary background check program, and — by establishing a nationwide mechanism to enable CLEOs to conduct these checks — Congress would thus further its goal of keeping weapons out of the hands of dangerous criminals. Although a voluntary program obviously might not be as comprehensive as a mandatory one, it would go a substantial way toward furthering Congress's objective.[14]

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of Police ("IACP")) (the IACP "will encourage its members to conduct a [background] check" in every instance if legislation leaves such checks to local law enforcement officials' discretion); *id.* at 358 (testimony of James Weber, Counsel, International Brotherhood of Police Officers) (police officers would not consider the process of completing a background check burdensome); *Handgun Violence Prevention Act of 1987, Hearings on S. 466 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 100th Cong., 1st Sess. 79 (1987) (testimony of Darwin McGlumphy, President, Akron Police Patrolmen's Association) (record checks conducted by local police departments part of the "daily operation" of police departments); *id.* at 84-85 (testimony of Darrel W. Stephens, Executive Director, Police Executive Research Forum) (costs associated with background checks are justified compared to costs of crime).

[14] Petitioner Mack is wrong in asserting (Br. 44-45) that severance will create inconsistencies in the statute. For example, he complains that a CLEO conducting voluntary checks will not be required to act within five days, but that requirement remains as a practical matter because the gun dealer is free to transfer the weapon after that period has expired. He also complains that States with optional background checks would not be excepted from the federal requirements, but, as we have discussed, Congress's goal was to create a program as comprehensive as the Constitution would permit, so there is no reason Congress would have waived the federal program and waiting period in States without mandatory background checks.

Petitioners argue (Mack Br. 42-43; Printz Br. 35) that in a jurisdiction in which the CLEO declines to perform background checks, the statute will impose a mandatory five-day waiting period, a result that Congress did not intend. Again, however, petitioners are unable to provide the necessary "strong evidence" that Congress would have rejected this result if it had known it could not mandate background checks. Congress recognized, as Senator Kohl put it, that

> [t]he waiting period not only gives us time to check criminal records, it gives individuals an opportunity to cool off. We all know that murders are often committed in the heat of the moment. * * * A waiting period prevents someone from getting a gun while consumed by passion.

137 Cong. Rec. S8939 (daily ed. June 27, 1991). Indeed, the National Rifle Association stated in 1976 that "'[a] waiting period could help in reducing crimes of passion and in preventing people with criminal records or dangerous mental illness from acquiring weapons.'" *Ibid.* (citation omitted). Many others in Congress echoed this view.[15]

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[15] See 139 Cong. Rec. S. 16413 (daily ed. Nov. 19, 1993) (Sen. Kennedy) (Brady Bill will "reduce the number of shootings by providing a cooling off period"); *id.* S16414 (Sen. Bradley) (one of bill's purposes is to "provide a cooling-off period"); *id.* H9089 (daily ed. Nov. 10, 1993) (Rep. Derrick) ("the waiting period will save lives by providing a cooling off period"); *id.* H9099 (Rep. Castle) (waiting period "allow[s] cooler heads to prevail"); *id.* H9106 (Rep. Roukema) (waiting period keeps "a flash of temper or moment of heated passion" from resulting in handgun violence); *id.* H9110 (Rep. Schenk) (waiting period would prevent individuals from "taking impulsive actions with deadly consequences"); *id.* H9113 (Rep. Andrews) ("5-day waiting period * * * provides a cooling off period"); *id.* H9114 (Rep. Clayton) ("waiting period[] would prevent impetuous and impulsive handgun purchases"); *id.*

In sum, logic and the available evidence indicate that Congress would have chosen to enact an optional background check. Petitioners have failed to carry their burden of presenting "strong evidence" to the contrary.

2. Petitioners' second claim (Printz Br. 38-43) is that all of Section 922(s) must be invalidated because Congress repeatedly has indicated its opposition to gun registration. This argument assumes that the record destruction requirement is independently unconstitutional and that CLEOs therefore will be able to retain the statements forwarded by gun manufacturers and dealers. If that provision is valid, CLEOs must destroy those statements, and therefore will not retain records of gun sales. Even if the record destruction requirement is independently invalid, however, it may be severed from the rest of Section 922(s).

Some Members of Congress plainly were concerned about the use of Brady Act records to create lists of gun owners. In addition to requiring the destruction of statements forwarded by gun manufacturers and dealers, the Act contains the following provisions regarding the use of these statements:

> (ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

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(Rep. Skaggs) (momentary passions "should not be indulged by immediate access to a deadly weapon"); *id.* H9118 (Rep. Stokes) (bill "prevent[s] purchases made in the heat of passion"; *id.* H756 (daily ed. Feb. 23, 1993) (Rep. Fingerhut) ("cooling-off period * * * may save them from taking somebody else's life"; see also *Hearings on H.R. 1025*, *supra*, at 77 (Asst. Atty. Gen'l Acheson) (bill "provides a cooling off period"); *id.* at 193 (Fraternal Order of Police) (supporting bill in part due to its "cooling-off period").

> (iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

18 U.S.C. § 922(s)(6)(B)(ii) & (iii). In view of these binding restrictions — whose validity petitioners do not challenge — there is no possibility that a CLEO could use Brady Act statements to establish a register of gun owners. Indeed, these restrictions are virtually identical to the protections in the permanent background check provision (see Section 103(i), 107 Stat. 1542), which petitioner Printz cites (Br. 40-41) as sufficient to "prohibit the registration of firearm owners." Certainly petitioners have failed to present "strong evidence" that Congress would have refused to enact the entire provision for fear that these two restrictions would be inadequate to prevent local officials from creating lists of gun owners.

Because the valid portions of Section 922(s) would prevent CLEOs from imposing gun registration, this Court should sever the record destruction provision and leave the remainder of the statute in effect.

3. Petitioners' final contention (Printz Br. 43-45) is that Section 922(s) should be invalidated in its entirety because Congress would not have enacted it without a provision requiring a CLEO to explain, upon request, why a purchaser is ineligible to receive a gun. Again, this argument assumes that the explanation requirement is independently unconstitutional — that a CLEO who voluntarily performs background checks cannot be required to supply the reasons for his determination. Even if the requirement is invalid, it is severable from the remainder of the statute.

The basis for petitioners' assertion is their contention that Congress was concerned that CLEOs might act arbitrarily in finding a purchaser ineligible. But a separate provision of the statute, 18 U.S.C. § 925A — which is entitled "[r]emedy for erroneous denial of firearm" — entitles any person to seek a

court order correcting erroneous actions by CLEOs. This protection, which petitioners do not challenge, provides a significant check on arbitrary action by a CLEO. Certainly petitioners have failed to present any "strong evidence" that Congress would have refused to enact the entire statute on the ground that this safeguard alone was inadequate.

Moreover, constitutional due process protections likely would be triggered if a CLEO found a purchaser ineligible to obtain a gun. See *Bell* v. *Burson*, 402 U.S. 535 (1971) (due process protections apply to suspension of drivers' license). Due process would require, at a minimum, that the individual be able to obtain the reasons for the adverse government action. See, *e.g.*, *Board of Curators* v. *Horowitz*, 435 U.S. 78, 85-86 (1978) (due process requires notice of charges). Thus, even if the statutory provision were invalidated, CLEOs would be required to provide an explanation of the determination that an individual is ineligible to receive a gun. There is, accordingly, no reason to invalidate the entire subsection, because ineligible persons still would be able to obtain the information that Congress wanted them to have.

Finally, even if the Constitution would not impose an explanation requirement, the entire background check provision should not be invalidated. Although petitioner Printz shows that the explanation provision had widespread support (Br. 43-45), he cites no evidence — let alone "strong evidence" — that Congress would have chosen to eliminate the entire background check provision if it had known that it could not require CLEOs to provide explanations.[16] Given Congress's intense interest in implementing background checks, petitioners simply cannot make that showing. This provision, too, is severable from the remainder of Section 922(s).

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[16] Significantly, the bill reported by the House Judiciary Committee did not contain this requirement. H.R. Rep. No. 344, *supra*, at 14.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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